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KYSC1975-SC-0723-01

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APPELLANT'S BRIEF

KENTUCKY COURT OF APPEALS

File No. 75-723

540 SW 2d 6

DEPARTMENT FOR HUMAN RESOURCES
COMMONWEALTH OF KENTUCKY

APPELLANTS

VS.

CARL BASHAM, et al.

APPELLEES

APPEAL FROM WARREN CIRCUIT COURT

Honorable Thomas W. Hines, Trial Judge

BRIEF FOR APPELLANTS

This is to certify that copies of this
Brief for Appellants have been served on
The Honorable Thomas W. Hines, Judge,
Warren Circuit Court, Division Two,
Courthouse, Bowling Green, Kentucky 42101;
and The Honorable George Gleitz, 416 East
Tenth Street, Bowling Green, Kentucky 42101,
this 22nd day of September, 1975, pursuant
to RCA 1.250.


Lynn T. Mitchell, Attorney for Appellant

FILED

SEP 22 1975

FRANCIS JAMES HILLS
CLERK
COURT OF APPEALS

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STATEMENT OF THE QUESTIONS PRESENTED

I.

DID THE TRIAL COURT ERR IN ITS ORDER OVERFULING THE DECISION OF THE SECRETARY OF THE DEPARTMENT FOR HUMAN RESOURCES IN HIS DENIAL OF THE APPELLEES' APPLICATION TO RECEIVE A CHILD?

II.

DID THE TRIAL COURT ERR IN REFUSING TO HEAR ANY TESTIMONY CONCERNING THE ISSUES INVOLVED IN THE CASE BEFORE HIM BEFORE ENTERING JUDGMENT?

KENTUCKY COURT OF APPEALS

File No. 75-723

DEPARTMENT FOR HUMAN RESOURCES
COMMONWEALTH OF KENTUCKY

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VS.

APPEAL FROM WARREN CIRCUIT COURT
Honorable Thomas W. Hines, Trial Judge

CARL BASHAM, et al.

APPELLEES

BRIEF FOR APPELLANTS

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

A. Statement of the Nature of the Proceeding

(For the purpose of this Brief, Secretary refers to the Secretary of the Department for Human Resources.)

This case arose as a result of the denial of the Appellees' application for permission to receive a child for the purpose of adoption pursuant to KRS 199.470 (4). The denial of the Secretary was dated March 13, 1975. The Appellees appealed from this denial to the Warren Circuit Court. A hearing was set for May 2, 1975, before the Trial Court. The hearing consisted of arguments by the attorneys for the parties as is shown by the transcript of the proceeding. The Trial Judge did not allow the Department for Human Resources to present any evidence as to the manner in which it arrived at its decision and decided the case after having read only the letter of denial from the Secretary. A judgment was entered setting aside the Secretary's denial of the Appellees' application. The Department for Human Resources appeals from that Order.

B. Statement of the Facts

Jason Dewayne Wilson was born November 13, 1974, to Katherine S. York. Upon release from the hospital, he was physically placed in the home of the Appellees without permission of the Secretary. The Appellees filed with the Department for Human Resources an application for permission to receive Jason Dewayne Wilson for adoption on January 14, 1975. Representatives of the Department for Human Resources investigated the request interviewing both the would-be adoptive parents and the mother of Jason Dewayne Wilson who is incidentally a ward of the Department. It was the Department's findings that the mother of the child had determined that she did not wish the Appellees to adopt her child. She indicated to the representative of the Department that she would continue to harass the Appellees, persons known to her, so long as they had custody of the child. The representative of the Department found that the adoptive couple were able to give the child adequate care from a physical standpoint. Based upon recommendations of the Department's workers the Secretary denied the application of the Appellees.

ARGUMENT I

The best interest of the child, Jason Dewayne Wilson, was a legitimate, reasonable basis for the Secretary to deny the application of the Appellees to receive him for adoption.

In determining the question before us, it is first essential to set out the statutes in question. These statutes are 199.470 (4) and 199.473 which are as follows:

KRS 199.470 (4)

"No petition for adoption shall be filed unless prior to the filing of the petition the child sought to be adopted has been placed for adoption by a licensed child-placing institution or agency or by the department, or the child has been placed with the written approval of the secretary; but no such approval shall be necessary in the case of:

(a) A child sought to be adopted by a stepparent, grandparent, sister, brother, aunt or uncle;

(b) A child received by the proposed adopting parent or parents from an agency without this state with the written consent of the secretary."

"(1) All persons other than a licensed child-placing agency or institution, the department or persons excepted by KRS 199.470 (4) or (5) who wish to place or receive a child shall make written application to the secretary for permission to place or receive a child. Upon receipt of an application to place or receive a child the secretary shall cause an investigation to be made of the home and the background of the person or persons wishing to receive the child. The purpose of the investigation shall be to determine the suitability of the applicants to receive a child, taking into account at all times the best interest of the child for whom application to receive has been made. The child welfare worker making the investigation shall make a finding in writing recommending either that the application be granted or that the application be denied. In either case reasons for the child welfare worker's recommendation shall be given in writing. The recommendation of the child welfare worker shall then be reviewed by the secretary. Based on the report and recommendation of the child welfare worker making the investigation, the secretary shall grant or refuse permission for the applicant to place or receive a child as early as practicable, but, in any case, the decision shall be made within sixty (60) days after the receipt of the application. In reaching his decision the secretary shall be guided by the ability of the persons wishing to receive the child to give the child a suitable home, and shall at all times consider the best interest of the child from a financial, medical, psychological and psychiatric standpoint. If the application is refused the secretary shall in general terms furnish in writing the reasons for his refusal.

"(2) In any case where the department refused to approve the placement of a child for adoption when requested by the parent or parents of the child, or refuses the request of any person or persons that a child be placed with him or them for adoption, the decision of the secretary in so refusing shall be final unless within ten (10) days after notice of refusal, the natural or proposed adopting parent or parents shall appeal to the circuit court of the county in which the adoption is proposed, provided however that no placement shall be disapproved on the basis of the religious, ethnic, racial or inter-faith background of the adoptive applicant, if such placement is made with the consent of the parent. The department shall be made a party defendant to the appeal. In the hearing of an appeal the court shall review the findings of the secretary and shall determine if the secretary has acted arbitrarily, unlawfully, or in such a manner as to constitute an abuse of discretion.

"(3) No person, association or organization, other than the department or a licensed child-placing institution or agency shall place a child or act as intermediary in the placement of a child for adoption or otherwise, except in the home of a stepparent, grandparent, sister, brother, aunt

or uncle, or upon written approval of the secretary. Nothing in this subsection shall be construed to limit the department for human resources in carrying out its aid to dependent children program in accordance with KRS chapter 205.

"(4) In the event a child who does not fall within the exception provided for in KRS 199.470 (4) or (5) is placed or received in a home without the permission of the secretary for human resources, or in the event permission to receive a child has been denied, a representative of the department may petition the juvenile court of the county in which the child is found setting out the facts concerning the child. When such petition has been filed, the juvenile court shall take jurisdiction of the child and shall provide for it as it would provide for a needy, neglected or dependent child under KRS 208.020 except that the child may not be placed in the home of the applicants to receive him unless permission to do so is granted by the secretary or such action is ordered by a circuit court or the Kentucky Court of Appeals.

"(5) Nothing in this statute shall be construed to limit the authority of the department or a licensed child-placing institution or agency to determine the proper disposition of a child committed to it by the juvenile court or the circuit court, prior to the filing of an application to place or receive."

It is clear from reading the above statutes that a primary consideration of the worker in making an investigation to determine whether or not an application for permission to receive a child should be granted is the best interest of the child. Further, in reviewing the recommendation of the worker and arriving at a decision whether or not to grant permission for an application to receive a child, the Secretary is bound to consider the best interest of the child. In the instant case the Secretary has found that it would not be in the best interest of the child, Jason Dewayne Wilson, to remain with the Appellees. This decision was based on material supplied him by one of the Department's social workers. This material or any explanation thereof was not considered by the trial court in arriving at the decision appealed from.

The case of Department of Child Welfare vs. Lorenz, Ky.. 407 S.W. 2d 699, 1966, is a case which held the statute in question constitutional held on page 702 as follows:

"...Fundamentally the best interests of the child must fashion the ultimate determination of whether the Commissioner should grant or deny approval for placement for adoption..."

In the instant case, the Secretary, in his letter of denial (Clerk's Certificate, page 3), has stated as one of the reasons for the denial, the hostile attitude of the mother of the child might interfere with the adjustment of the child in the family of the applicants. That is to say that because of the hostile attitude of the mother and the actions which she may potentially take, it would be psychologically against the best interest of the child to allow him to remain in the home of the Appellees. We believe that this reason is a valid reason for denying the application for permission to receive the child and one which should be upheld by the Trial Court.

ARGUMENT II

The Secretary did not act arbitrarily, unlawfully, or in such a manner as to constitute abuse of discretion in denying the application of the Appellees to receive the child, Jason Dewayne Wilson.

KRS 199.473 (2) sets out the standard to which the Secretary must conform in making a decision on an application for permission to receive a child. This standard is that the Secretary shall not act arbitrarily, unlawfully, or in the manner which would constitute abuse of discretion.

The standard was upheld in the case of Department of Child Welfare vs. Jarboe, Ky. 464 S.W. 2d 287, 1971, when the court stated:

"...It is the contention of the Department that the court could not properly authorize the adoption without the consent of the Department of Welfare unless the Department was acting arbitrarily and unreasonably. We believe this position to be sound..."

In denying the Appellees' application, the Secretary's decision was sound in that it was based on a real problem which would confront the Appellees in their attempt to rear the child in question. There are two bases for the Secretary's decision. First the child is not free for adoption as the mother has not consented to the adoption by the Appellees. Second and perhaps more important, the hostile attitude of the mother could cause problems which in the future would militate against the best interest of the child, Jason Dewayne Wilson. In deciding as he

did, the Secretary was neither acting arbitrarily, unlawfully or in the abuse of his discretion. No where in the transcript of proceedings nor in the judgment entered by the Trial Court does the Trial Court indicate in what manner the Secretary acted arbitrarily, unlawfully or in a manner to constitute abuse of discretion.

ARGUMENT III

The Trial Court should have heard evidence on the Secretary's denial of the Appellees' application for permission to receive the child.

The Trial Court could not as a matter of law overrule the denial of the Secretary without first knowing the basis upon which the Secretary had made his ruling. The Trial Court could not fully be apprised of the Secretary's reason for denial unless he had the benefit of testimony of the persons making the recommendations to the Secretary, such testimony including a detailed explanation of the reasons for such recommendations. That is, the Court could not have determined that the Secretary was acting arbitrarily, unlawfully or in the manner constituting abuse of his discretion without having heard evidence upon which the action was taken.

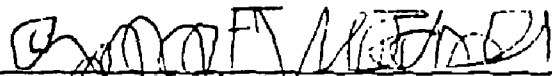
The Department for Human Resources employs persons trained in the practice of social work and experienced in working with children and adoptive homes. It is upon the recommendations of such trained, experienced persons that the Secretary made his decision. The Trial Court should have also had the benefit of this same expertise before deciding the question.

CONCLUSION

Based on the arguments stated above, the Appellant urges the Court to set aside the judgment of the Trial Court dated May 19, 1975, and order the entry of a judgment affirming the Secretary's denial of application of the Appellees to receive the child, Jason Dewayne Wilson, or in the alternative, it is urged that the case

be remanded to the Trial Court with the instructions that an evidentiary hearing be held in order for the Trial Court to determine the reasons for the Secretary's denial before making a final ruling.

Respectfully submitted,


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